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No. 1058 164

In the Supreme Court of the United States

OCTOBER TERM, 1956

EDGAR E. HOPPE, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Claims (Pet. App. 2a-11a) has not yet been reported.

JURISDICTION

The judgment of the Court of Claims was entered on October 2, 1956. Petitioner's motion for rehearing was denied on March 6, 1957. The petition for a writ of certiorari was filed on June 4, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the Court of Claims correctly held that petitioner's removal from the Internal Revenue Serv-

ice violated none of his rights as an employee in the classified civil service.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of Section 6 of the Lloyd-LaFollette Act of August 24, 1912, 37 Stat. 539, 555, as amended, 5 U.S.C. 652 and of the Civil Service Commission regulations, 5 C.F.R. 9.101 *et seq.* are set out in the appendix, *infra*, pp. 11-14.

STATEMENT

On October 7, 1953, petitioner, a non-veteran in the classified civil service, was employed as Assistant Commissioner (Inspection), GS-18, in the Internal Revenue Service of the Treasury Department.

By letter dated July 17, 1953, O. Gordon Delk, Deputy Commissioner, notified petitioner of an intention to separate him from the service (R. 32-37). The letter set forth as the reasons for the proposed action three principal charges of inefficiency and incompetence in office, each of which were supported by one or more detailed specifications.[1] In addition to replying in detail to the charges, the petitioner in his answer made a number of counter-charges of conspiracy and other illegal acts on the part of his superiors (R. 70-92). Thereafter, the Secretary of the Treasury notified petitioner that the third charge in the letter of July 17,

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[1] The principal charges were:

"(1) You have not demonstrated ability to develop an appropriate inspection program for the Internal Revenue Service. . . .

(2) You have not demonstrated ability to appropriately organize and control a going organization.

(3) You have not exhibited the degree of objectivity and sound judgment essential to the adequate performance of a high-level Federal executive position."

1953, was amended by the addition of a specification indicating that his allegations of illegal acts evidenced petitioner's inability to work loyally and efficiently under his superiors. Petitioner was granted time to respond and did so (R. 93-94).

On October 7, 1953, the Secretary of the Treasury notified petitioner:

> Your replies to the charges filed against you on July 17, 1953, as amended by an additional specification dated August 19, 1953, have been considered.
>
> I have decided that your removal will promote the efficiency of the service and, therefore, notify you that you will be removed from the position of Assistant Commissioner (Inspection), Internal Revenue Service, effective at the close of business October 7, 1953.

A Standard Form 50, Notice of Personnel Action, was prepared as of the same date, which stated that petitioner was removed for inefficiency, incompetence, and inability to work loyally under the Commissioner and Deputy Commissioner (R. 41).

On October 12, 1953, petitioner appealed to the Civil Service Commission contending that the charges were lacking in specificity, that he had not been heard personally on these charges, and that his removal was made for political reasons (R. 46-49). This appeal was supported by a brief filed by petitioner's counsel on November 9, 1953.

On November 12, 1953, the Chief, Service Record Division, advised petitioner that in the case of a non-veteran removed for inefficiency the judgment of the appointing officer was not reviewable by the Commis-

sion and that, while the Commission had authority to review where the required procedures were not followed, such procedures had been followed here (R. 49-51). Petitioner was further told that the Commission could consider the political motivation charge, if petitioner would submit a statement outlining all the facts and circumstances upon which the charge was based and such supporting evidence as he could obtain (R. 49-51). Petitioner submitted a sworn statement on December 7, 1953, and subsequently, through counsel, advised the Commission that he did not wish to submit any other material (R. 56).

On May 26, 1954, the Chairman of the Civil Service Commission notified petitioner that, based on careful investigation and study of the materials submitted, the Commission had concluded that the claim of political motivation for the dismissal was not supported (R. 55-56). Thereafter, on May 24, 1955, after a request for reconsideration, the Commission advised petitioner that further review revealed no procedural defects in the removal and that, on reconsideration of the contention that the removal was for political reasons, it was again found that there had not been established a *prima facie* case warranting further Commission action (R. 57-58).

On August 19, 1955, petitioner instituted this suit for back pay in the Court of Claims, alleging that his removal had been improper for substantially the reasons pressed upon the Civil Service Commission (R. 1-3). On October 2, 1956, the Court of Claims granted the Government's motion for summary judgment, holding that there was "no arbitrary, capricious, or otherwise illegal action and * * * no procedural defects in plain-

tiff's removal." (Pet. App. 8a). Subsequently, on October 26, 1956, petitioner's counsel requested the Civil Service Commission to permit him to review its file in the case, particularly its investigation in connection with the claim of political motivation (Motion for Rehearing, p. 23). On November 6, 1956, the Commission declined to comply with this request (Motion for Rehearing, p. 24). Petitioner moved for rehearing in the court below on November 30, 1956, and in connection therewith, on February 1, 1957, moved for an order requiring the Civil Service Commission to produce, among other things, the investigative report. The Government opposed on the grounds that the motion was out of time and the material sought was irrelevant to the issue on rehearing. On March 6, 1957, the Court of Claims, without opinion, denied the motion and the petition for rehearing (R. 105).

ARGUMENT

1. Although the petitioner claimed below that the removal action was procedurally defective in a number of respects, the only such invalidity now alleged is that the notice of adverse action failed to state the reasons for the Secretary's decision.[2]

Section 6 of the Lloyd-LaFollette Act of 1912, *infra*, p. 11, requires that after notice of charges and answer the employee be furnished "with a written decision on such answer". The applicable Civil Service Commission regulation, 5 C.F.R. 9.102(a)(1), *infra*, pp. 12-13,

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[2] Among the contentions now abandoned are (1) that the charges in the letters of July 17, 1953, as amended by the letter of August 19, 1953, lacked specificity; (2) that the dismissal violated the provisions of the Performance Rating Act of 1950; (3) that the dismissal was illegally based on a defense to the original charges; and (4) that the dismissal was politically motivated.

provides that the agency must consider the answer, must furnish the employee with a written decision, and, if the agency determines that removal or other action is warranted, the employee must be notified in the decision of the reasons for the action taken and its effective date. As the Court of Claims determined (Pet. App. 7a), the notice of removal here constitutes substantial compliance with these requirements.

The letter of October 7, 1953, notifying petitioner of the decision of the Secretary of the Treasury, stated that the replies to the charges contained in the two notices had been considered, that the Secretary had decided that petitioner's removal would promote the efficiency of the service, and therefore, that he would be removed at the close of business on October 7, 1953. It is clear from this notice that the basis of the Secretary's decision and the only basis for that decision were the charges in the two letters and petitioner's answers to those charges. There was no need to repeat the charges as they had been set forth in detail in the notices of proposed adverse action. Moreover, the notice of personnel action of October 7, 1953, stated that removal was "for inefficiency, incompetence and inability to work loyally under the Commissioner and Deputy Commissioner," (Pet. App. 7a) which were precisely the reasons set forth in the charges on which the Secretary expressly relied in the notice of adverse action. As noted in *Mulligan* v. *Andrews*, 211 F. 2d 28 (C.A. D.C.), according to the Civil Service Commission's interpretation of its regulations governing removal,[3] the requirement of reasons in the notice of adverse action is to make certain that removal is based

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[3] See Federal Personnel Manual, S 1-28 (1949).

solely on stated charges. We believe that no other meaning is reasonably inferrable from a reading of the Secretary's letter here.

Petitioner's reliance on *Mulligan* v. *Andrews, supra,* and *Blackmar* v. *United States,* 120 F. Supp. 408 (C. Cls.) is unfounded. In the *Mulligan* case, *supra,* at p. 30, the Court of Appeals expressly based its holding of procedural irregularity on the fact that the notice of adverse action included no mention at all of the charges against the employee, referring only to his reply "together with the facts developed during the investigation", and concluding that "the evidence is such as to show your unsuitability for continuance * * *." The *Blackmar* case, on the other hand, concerned uncertainty as to the basis for a decision by a reviewing authority, and the language quoted by petitioner (Pet. 8) is in no way related to initial notification of adverse action by the agency head.

2. Petitioner's further contention, that in enacting Section 6 of the Lloyd-LaFollette Act, *infra,* p. 11, Congress intended to give him a right to a review on the merits by the Civil Service Commission (Pet. 4-5), was properly rejected by the Court of Claims in view of the statutory language and legislative history.[4] While Section 6 of the Act permits removal of classified civil service employees only for such cause as will promote the efficiency of the service, it does not follow that either the Civil Service Commission or the courts may judge the sufficiency of that cause. When the Act was passed in 1912, it made no provision for appeal to the

[4] This argument was made by petitioner on his motion for rehearing which, as noted before, was denied, without opinion, by the Court of Claims.

Civil Service Commission or for any hearing by that body, and it makes no such provision now.

Long prior to the enactment of the Lloyd-LaFollette Act, this Court held that the question of what constituted cause for removal of a classified employee was for the judgment of the removing officer. *Keim* v. *United States*, 177 U.S. 290. And it is settled that the Act did not modify this holding. *Eberlein* v. *United States*, 257 U.S. 82; *Williams* v. *Cravens*, 210 F. 2d 874 (C.A. D.C.), certiorari denied, 348 U.S. 819; *Carter* v. *Forrestal*, 175 F. 2d 364 (C.A. D.C.), certiorari denied, 338 U.S. 832; *Powell* v. *Brannan*, 196 F. 2d 871 (C.A. D.C.).[5]

The Commission's regulation, 5 C.F.R. 9.105,[6] *infra*, pp. 13-14, providing that, except as required in the case of veterans, the Commission "shall not investigate or review the sufficiency of the reasons for removal" carries out the Congressional intent. In order, however, to protect an employee from removal without compliance with applicable procedural requirements, for purely political reasons, or because of marital status, the Commission has provided that it may investigate a removal when the employee establishes a *prima facie* case that his separation was for any of these reasons. Petitioner's contentions that, in removing him, the agency failed to comply with certain procedural requirements

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[5] That Congress never intended to provide for administrative review which would impede executive discretion in the question of reasons for removal of non-veterans is made evident by a comparison of the Lloyd-LaFollette Act with section 14 of the Veterans' Preference Act of 1944, 58 Stat. 390, as amended, 5 U.S.C. 863, which explicitly provides a right of appeal to the Civil Service Commission from dismissal actions against veterans.

[6] The provisions of this section have not been substantially changed since issued under Executive Order 7915, June 24, 1938, effective, February 1, 1939; 3 Fed. Reg. 1519, *et seq.*

and that his removal was politically motivated were investigated and rejected by the Commission on petitioner's several appeals.[7] He thus received all he was entitled to under the Lloyd-LaFollette Act and the applicable regulations.

3. Petitioner also urges that the proceedings resulting in his removal were defective because he was denied the right to examine "the investigative and appeal record" (Pet. 5-7). But petitioner did not request access to these records during the administrative proceeding and indeed first wrote the Commission for such permission only after the court below had issued its adverse opinion. See *supra*, p. 5. Moreover, although petitioner's argument is phrased in terms of an improper "classification" of the Commission's reports, the Commission's letter using the words "privileged and confidential" does not appear to refer to a formal classification of the material in a security sense, but rather to the fact that the papers requested were internal files rather than public ones (Ex. E, Motion for Rehearing). The Commission's action had not been in the nature of a hearing to review petitioner's dismissal, but had constituted an attempt to determine whether petitioner had made a *prima facie* showing that the real basis for his removal was being concealed. Since the Commission had satisfied itself that no hearing was necessary, there was nothing in the nature of

[7] The allegations of procedural violations were rejected in the three letters from the Commission to the petitioner dated November 12, 1953, May 26, 1954, and May 24, 1955. Petitioner's contention of political motivation was rejected on the latter two occasions. All but one of these contentions have now been abandoned. See *supra*, p. 5, fn. 2.

a record to be disclosed. Petitioner was really attempting to pry into the internal workings of the Commission, a matter which is, of course, not required to be disclosed. Cf. *Morgan* v. *United States*, 313 U.S. 409, 422.

4. Finally, petitioner asserts that the Commission improperly failed to consider representations of his counsel "at the first level of appeal" (Pet. 9). The claim is apparently based on the fact that his counsel's brief to the Commission in support of his charges of procedural defects and political motivation in his removal was mailed on November 9, 1953, and the Commission rejected the former charge by letter dated November 12, 1953. This short interval of time, however, does not indicate that the brief went unconsidered by the Commission in issuing its ruling. And, in any event, petitioner was represented by counsel on the two subsequent stages of his appeal before the Commission at which time all allegations presented by petitioner were thoroughly considered and rejected.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY, 1957.

APPENDIX

1. Section 6 of the Lloyd-LaFollette Act of August 24, 1912, 37 Stat. 539, 555, as amended 5 U.S.C. 652 provides:

> (a) No person in the classified civil service of the United States shall be removed or suspended without pay therefrom except for such cause as will promote the efficiency of such service and for reasons given in writing. Any person whose removal or suspension without pay is sought shall (1) have notice of the same and of any charges preferred against him; (2) be furnished with a copy of such charges; (3) be allowed a reasonable time for filing a written answer to such charges, with affidavits; and (4) be furnished at the earliest practicable date with a written decision on such answer. No examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer or employee directing the removal or suspension without pay. Copies of the charges, the notice of hearing, the answer, the reasons for removal or suspension without pay, and the order of removal or suspension without pay shall be made a part of the records of the proper department or agency, as shall also the reasons for reduction in grade or compensation; and copies of the same shall be furnished, upon request, to the person affected and to the Civil Service Commission. * * *

2. The regulations of the Civil Service Commission, 5 C.F.R. 9.101, *et seq.* provide in pertinent part:

> § 9.101 *Agency responsibility for separation or demotion of employees.* (a) The employing agency shall remove, demote, or reassign to another position any employee in the competitive service whose

conduct or capacity is such that his removal, demotion, or reassignment will promote the efficiency of the service. The grounds for disqualification of an applicant for examination stated in § 2.104 (a) (2) through (8) of this chapter shall be included among those constituting sufficient cause for removal of an employee.

(b) The discretion vested in the appointing officer to remove employees under his jurisdiction, or to take other disciplinary action, is subject only to the following restrictions:

(1) Employees serving under other than probational or temporary appointments in the competitive service and employees having a competitive status who occupy positions in Schedule A or B of Part 6 of this chapter, which are not of a primarily confidential or policy determining character, shall not be removed, suspended, or demoted except for such cause as will promote the efficiency of the service and in accordance with the procedure prescribed in § 9.102.

(2) Discrimination shall not be exercised in removals, suspensions, or demotions because of an employee's religious opinions or affiliations, or because of his marital status or race, or except as may be required by law because of his political opinions or affiliations.

(3) Like penalties shall be imposed for like offenses whenever removals, suspensions or demotions are made, or when other disciplinary actions are taken.

§ 9.102 *Procedure in separating, suspending, or demoting permanent and indefinite employees.*

(a) * * *

(1) *Actions against employees.* No employee, veteran or nonveteran, shall be separated, sus-

pended, or demoted except for such cause as will promote the efficiency of the service and for reasons given in writing. The agency shall notify the employee in writing of the action proposed to be taken. This notice shall set forth, specifically and in detail, the charges preferred against him. The employee shall be allowed a reasonable time for filing a written answer to such charges and furnishing affidavits in support of his answer. He shall not, however, be entitled to an examination of witnesses, nor shall any trial or hearing be required except in the discretion of the agency. If the employee answers the charges, his answer must be considered by the agency. Following consideration of the answer, the employee shall be furnished at the earliest practical date with a written decision. If the agency determines that removal or other action is warranted, the employee shall be notified in the decision of the reasons for the action taken and its effective date. Copies of the charges, notice of hearing (if any), answer, reasons for removal, or other action, shall be made a part of the records of the department or agency concerned.
* * *

* * * * *

§ 9.105 *Authority of Commission to investigate separations, suspensions, reassignments, or demotions.* (a) Except as required by section 14 of the Veterans' Preference Act, the Commission shall not investigate or review the sufficiency of the reasons for removal, suspension, reassignment, or demotion of an employee.

(b) The Commission may investigate the removal, suspension, reassignment or demotion of an employee when such employee establishes a prima facie case that:

(1) The procedure prescribed by the Commission under § 9.102 (a) (1) has not been followed (regardless of other allegations); or

(2) The removal, suspension, reassignment or demotion was made for political reasons, except as may be required by law, or resulted from discrimination because of marital status. * * *